Issue: Compliance; Hearing Decision; Ruling Date December 10, 2001; Ruling #2001-199;
Agency: Virginia Commonwealth University; Outcome: In compliance Hearing Officer.

COMMONWEALTH *of VIRGINIA*
Department of Employment Dispute Resolution
COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University
Ruling Number 2001-199
December 10, 2001

Virginia Commonwealth University (VCU), through its representative, has appealed the hearing officer's October 12, 2001 decision in hearing case No. 5283. The agency objects to the decision on four grounds. First, VCU contends that the hearing officer erred by concluding that VCU has "established a pattern of forgiving discipline." Second, the agency claims that the hearing officer exceeded the scope of his authority by finding that four prior automobile accidents by other police officers "could have resulted in Group III Written Notices." Third, the agency alleges that the hearing officer abused his authority when he recommended that "if the University wishes to use the amount of [property] damage as a basis to distinguish between levels of disciplinary actions, that the University notify police officers of the change in its application of policy." Finally, VCU claims that the decision is inconsistent with law and policy.

FACTS

The grievant is employed by VCU. He was issued a Group III Written Notice with five days suspension for willfully or negligently damaging state property.[1] He grieved the disciplinary action and proceeded to hearing. The hearing officer rescinded the disciplinary action and suspension citing an inconsistent application of corrective action. The University has appealed that decision to this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions in all matters related to procedural compliance with the grievance procedure."[2] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[3] The Department of Human Resource (DHRM) management has the authority to determine whether the hearing

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[1] Grievant had an accident with his patrol vehicle resulting in damages in excess of $15,000.
[2] Va. Code § 2.2-1001 (3) and (5).
[3] See *Grievance Procedure Manual* § 6.4 (3), page 18.

decision is consistent with policy.[4] Further, the circuit court in the jurisdiction where the grievance arose has appellate jurisdiction to determine whether the hearing decision is consistent with law.[5]

I.   Whether the Decision is Inconsistent with Law and Policy

The agency asserts that the decision is not consistent with law and policy because the decision holds that in determining the level of disciplinary action, the agency may only consider the grievant's behavior rather than the amount of damage done to a vehicle. In accordance with above, whether the hearing decision is consistent with policy is a matter for DHRM, not this Department, to determine. Likewise, questions regarding the decision's conformity with law are to be reviewed by the circuit court in the jurisdiction in which the grievance arose, not this Department. Only final hearing decisions are reviewed by the circuit court. The hearing officer's decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by this Department or DHRM, the hearing officer has issued a revised decision.[6]

II.   Whether the Hearing Officer Exceeded the Scope of his Authority

The agency asserts that the hearing officer exceeded his authority by making a finding, based on insufficient evidence, that the University had "established a pattern of forgiving discipline" as a result of the corrective action taken in four prior accident cases. In a related challenge, the agency asserts that the hearing officer erred by concluding that earlier accidents by other VCU Police Officers could have warranted Group III Written Notices.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and "to determine the grievance based upon the evidence."[8] This Department does not substitute its judgement for that of the hearing officer regarding the admissibility, materiality and weight of the evidence, the credibility of the witnesses, or any related factual findings, as long as the hearing decision is based upon the record evidence and the material issues in the case.

In this instance, the hearing officer determined that under the facts of each of the four cases, management could have found the employees' conduct to be willful or negligent, thereby falling within Standards of Conduct guidelines for issuance of a Group III Written Notice.[9] As part of his determination whether to mitigate, the hearing officer acted within the scope of his authority by considering the evidence before him regarding the nondisciplinary corrective action taken by

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[4] Va. Code § 2.2-3006 (A).

[5] Va. Code § 2.2-3006 (B).

[6] *See Grievance Procedure Manual* § 7.2(d), page 20. *See also Grievance Procedure Manual* § 7.3, page 20, for discussion on circuit court review.

[7] Va. Code § 2.2-3005 (D).

[8] *Grievance Procedure Manual* § 5.7, page 14.

[9] The exhibits reviewed by the hearing officer appear sufficient to have allowed him to conclude that each of the four other officers engaged in acts that were, to some degree, negligent and caused varying degrees of damage to state property. In 3 of the 4 other accidents, driver negligence and/or inattention are expressly cited as reasons for the accidents. In the 4th accident involving a police cruiser that collided with anther vehicle while attempting to execute a U-turn, this department finds that the hearing officer did not err by inferring that negligence played a role in the accident.

management in each of the other four accident cases. While reasonable minds might disagree as to whether past agency actions established a pattern of leniency, this Department concludes that the record contained sufficient evidence to allow the hearing officer to reach the conclusion that the agency "established a pattern of forgiving discipline."

III.   Whether the Hearing Officer Abused his Authority in Recommending that the University Notify Police Officers of the Change in its Application of Policy.

The agency asserts that the hearing officer abused his authority by recommending that "if the University wishes to use the amount of damage as a basis to distinguish between levels of disciplinary action, that the University notify police officers of the change in its application of policy."

Under the grievance procedure, a hearing officer may include in his decision a recommendation that addresses the issues that were qualified for hearing; specifically, whether grievant should receive a Group III Written Notice of disciplinary action with suspension. If a recommendation is made, the hearing decision should clearly identify it as such and distinguish it from an order. Absent a court order an agency is not compelled to act upon any recommendation.[10]

In this case, the hearing officer found that the University had inconsistently applied corrective action by using the amount of damages as the primary factor in determining the level of disciplinary action. In this instance, the hearing officer's recommendation is instructive only and simply advises the University on action that it might take to help show that its disciplinary action was warranted and appropriate in future cases.

<u>CONCLUSION</u>

For the reasons discussed above, this Department finds that the hearing officer neither abused discretion nor exceeded the scope of his authority in deciding this case. This Department's rulings on matters of compliance are final and nonappealable.[11]

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[10] *Rules for Conducting Grievance Hearings*, page 11.
[11] Va. Code § 2.2-1001(5).